

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

BENJAMIN LOHEIDE
Law Office of Benjamin Loheide
Columbus, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WALTER LEE McKINNON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 03A01-0606-CR-243

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0505-FA-754

February 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Walter L. McKinnon appeals the sentence imposed following his plea of guilty to three counts of child molesting, as class A felonies.¹

We affirm.

ISSUE

Whether the trial court erred in sentencing McKinnon.

FACTS

In 2001, McKinnon made his seven-year-old daughter, K.C., perform oral sex on him. McKinnon continued molesting K.C. every two to three weeks for the next four or five years, including a time in February of 2005. McKinnon also videotaped K.C. performing oral sex on him and took pornographic pictures of K.C.

Also in 2001, McKinnon made his ten-year-old son, A.C., and his eleven-year-old son, J.M., perform oral sex on him. McKinnon molested his sons approximately a dozen times. McKinnon ceased molesting his sons in 2001, after child protective services investigated a report that K.C. had been molested. That investigation, however, did not lead to any charges against McKinnon.

In 2005, McKinnon had custody of K.C., J.M. and A.C. and was living with them in Columbus. In May of 2005, a friend of McKinnon viewed a videotape of K.C. performing oral sex on McKinnon and reported it to the Columbus Police Department.

¹ Ind. Code § 35-42-4-3.

The State charged McKinnon with four counts of child molesting as class A felonies and one count of possession of child pornography as a class D felony. On August 22, 2005, McKinnon and the State filed a plea agreement with the trial court, whereby McKinnon agreed to plead guilty to three counts of child molesting as class A felonies, and the State agreed to dismiss one count of child molesting as a class A felony and the count of possession of child pornography as a class D felony.

The trial court ordered a presentence investigation report (“PSI”) and held sentencing hearings on October 5, 2005 and December 14, 2005.² The trial court found as follows:

I have reviewed the information before the Court, and the doctor’s [sic] reports in particular. Both doctors have found that you meet the statutory definition of sexually violent predator as defined by Indiana Code. And both doctors have found that you are an individual who is likely to repeatedly engage in sexual offenses. So that is an aggravating factor. You do not have any prior convictions[,] which is a mitigating factor. The presentence report and . . . Dr. Parker’s report in particular indicate that sexual offenders who limit their activity to incest are at a lower risk of re-offense than offenders who abuse children not related to them. And the presentence report has language that says there are no indications that he is a predatory type sex offense, but rather he was opportunistic and took advantage of vulnerable and trusting victims who were easily accessible. I’m not sure which is worse, to molest your own children or to randomly go looking for victims. You are in a special position of trust with your own children. You are in a position of power with them that exceeds the power that simply exists because you are an adult. And their access to other supportive persons or protective persons is limited by the fact that you are a parent. I think that’s kind of a break even. Based upon the information in the doctors’ reports, it appears that you are likely to repeat these offenses. I indicated that you did sort of seek some assistance, but that you were not honest when you did seek other assistance. . . . So you just didn’t have the

² The trial court continued the sentencing hearing to December 14, 2005 to allow the trial court to obtain reports on whether McKinnon was a sexually violent predator.

wherewithal or didn't take the opportunity to really try to make any positive improvements. . . . And the only way to try to keep something like this from happening again, is for you to address it head-on and you have not indicated any real plan to do so. . . . [B]ecause of the multiple offenses that occurred, much more than three, the Court is going to be ordering the sentences to be run consecutively with each other. The Court will order you to receive a sentence of thirty-five years on each because the Court believes that it is aggravating that you were molesting your own children, repeatedly did so. And I guess the most aggravating factor that I find was that there were some allegations made earlier and it was reported and you fought that, resisted that, and that was your opportunity to address it. You chose to do nothing. Well, you chose to continue your deception. You did not address it head-on. And so you continued to commit the offenses.

(Tr. 52-54). On each count, the trial court sentenced McKinnon to thirty-five years, with ten years suspended, and it furthered ordered the sentences to be served consecutively. Thus, McKinnon received a total executed sentence of seventy-five years.

DECISION

McKinnon asserts the trial court erroneously sentenced him to thirty-five years on each count and ordered that the sentences be served consecutively.³ Specifically, McKinnon maintains that 1) the trial court failed to consider mitigating circumstances; 2) the trial court's sentencing statement was inadequate; and 3) his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied, cert. denied*, 127 S. Ct. 497 (2006). "The trial court's sentencing discretion includes determining whether to

³ The statutory sentencing range for a class A felony was twenty to fifty years, with the presumptive sentence being a fixed term of thirty years. I.C. § 35-50-2-4. Subsequent to the date of McKinnon's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-4 to provide for an "advisory" rather than a "presumptive" sentence. See P.L. 71-2005, § 7 (eff. Apr. 25, 2005).

increase the sentence, to impose consecutive sentences on multiple convictions, or both.” *Id.* In order for a trial court to impose enhanced or consecutive sentences, it must 1) identify the significant aggravating and mitigating circumstances; 2) relate the specific facts and reasons that the trial court found those to be aggravating and mitigating circumstances; and 3) demonstrate that the trial court has balanced the aggravating and mitigating circumstances. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

1. Mitigating Circumstances

McKinnon asserts the trial court overlooked three significant mitigating circumstances: his guilty plea, remorse and troubled childhood. A trial court must consider all evidence of mitigating circumstances presented by a defendant. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*. The finding of mitigating circumstances, however, rests within the sound discretion of the trial court. *Id.* The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. *Id.*

The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” *Id.* Furthermore, the trial court need not agree with the defendant as to the weight or value to be given to proffered mitigating circumstances. *Id.* The trial court need enumerate only those mitigating circumstances it finds to be significant. *Ross v. State*, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), *trans. denied*.

a. *Guilty plea*

The trial court did not specifically identify McKinnon's guilty plea as a mitigating circumstance. "Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). A guilty plea, however, is not necessarily a significant mitigating factor. *Id.*

Here, McKinnon received a significant benefit from his guilty plea. In exchange for his guilty plea, the State dropped two charges, including a class A felony. Furthermore, while McKinnon's guilty plea saved the State the expense and time of a trial, the benefit to the State was moderate as McKinnon had already given several statements implicating himself, and the State possessed a videotape clearly showing K.C. performing oral sex on McKinnon. Thus, we do not find that the trial court abused its discretion in failing to identify McKinnon's guilty plea as a mitigating circumstance as we cannot say that it was significant. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one."), *trans. denied*.

b. *Remorse*

McKinnon contends that the trial court should have considered his remorse as a mitigating circumstance. At sentencing, McKinnon made the following statement regarding his crime against K.C.: "I had her perform oral sex on me. . . . After it happened you know I felt bad about it." (Tr. 22-23). Regarding his crime against A.C.,

McKinnon stated, “I don’t know why I did it. I know I felt bad. . . . It . . . was . . . wrong” (Tr. 24). McKinnon also expressed that he wanted his children to know that he was sorry.

Although McKinnon expressed some remorse, it is tempered by the fact that McKinnon continued to commit crimes against his children, knowing that what he was doing was wrong. Thus, do not find that the trial court abused its discretion in failing to either identify or find remorse to be a significant mitigating circumstance.

c. Childhood

McKinnon also contends that the trial court abused its discretion in not considering McKinnon’s troubled childhood as a mitigating circumstance. McKinnon asserts the physical abuse from his stepfather and leaving home at the age of fourteen “should not have been ignored by the sentencing court.” McKinnon’s Br. 10.

A difficult childhood may warrant little, if any, mitigating weight. *See Rose v. State*, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004). Thus, we find no abuse of discretion in failing to consider McKinnon’s troubled childhood as a mitigating circumstance.

2. Sentencing Statement

McKinnon argues that the trial court abused its discretion when it sentenced him to an enhanced sentence on each count and ordered the sentences to be served consecutively because “there was no specific mention by the court that it had weighed the aggravating and mitigating circumstances.” McKinnon’s Br. 7.

When the reviewing court finds an irregularity in a trial court sentencing determination, we have at least three courses of action: 1) “remand to the trial court for a clarification or new sentencing determination”, 2) “affirm

the sentence if the error is harmless”, or 3) “reweigh the proper aggravating and mitigating circumstances independently at the appellate level.”

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto*, 829 N.E.2d at 525), *trans. denied*.

Although the trial court did not specifically mention that it weighed the circumstances, its discussion of the aggravating circumstances and one mitigating circumstance—McKinnon’s lack of criminal history—adequately demonstrates that it engaged in an evaluation and balancing of the circumstances in determining McKinnon’s sentence. Accordingly, the trial court’s failure to include this discussion in the sentencing order is harmless error.

3. Inappropriate Sentence

McKinnon asserts that his sentences are inappropriate in light of the nature of his offenses and his character. “Our review under Appellate Rule 7(B) is extremely deferential to the trial court.” *Pennington v. State*, 821 N.E.2d 899, 903 (Ind. Ct. App. 2005).

The “nature of the offense” refers to the statutory presumptive (now advisory) sentence for the class of crimes to which the offense belongs. *Id.* Thus, the presumptive (advisory) sentence is meant to be the starting point for the trial court’s consideration of the appropriate sentence for the particular crime or crimes committed. *Id.* The “character of the offender” refers to the sentencing considerations in Indiana Code section 35-38-1-7.1, which contains general sentencing considerations, the balancing of aggravating and mitigating circumstances, and other factors within the trial court’s discretion. *Id.* “This

court is mindful of the principle that ‘the maximum sentence enhancement permitted by law should be reserved for the very worst offenses and offenders.’” *Matshazi v. State*, 804 N.E.2d 1232, 1241 (Ind. Ct. App. 2004) (citing *Borton v. State*, 759 N.E.2d 641, 648 (Ind. Ct. App. 2001), *trans. denied*), *trans. denied*.

In this case, McKinnon repeatedly molested three of his children and molested his daughter over a period of several years. These facts justify McKinnon’s consecutive, enhanced sentences. Furthermore, the sentences were for less than the maximum McKinnon could have received. Accordingly, we find McKinnon’s sentences to be appropriate.

Affirmed.

BAKER, J., and ROBB, J., concur.